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IN THE SUPREME COURT OF THE UNITED STATES

(29)

No. 03-6696

YASER ESAM HAMDI AND ESAM FOUAD HAMDI,
AS NEXT FRIEND OF YASER ESAM HAMDI, PETITIONERS

v.

DONALD RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

Pursuant to Rule 15.8 of the Rules of this Court, respondents respectfully file this Supplemental Brief to address the decision of the United States Court of Appeals for the Second Circuit in Padilla v. Rumsfeld, __ F.3d __, 2003 WL 22965085 (Dec. 18, 2003), which was issued after the filing of respondents' Brief in Opposition in this case. The United States intends to file a petition for a writ of certiorari in Padilla on or by January 20, 2004, and to propose expedited consideration of the Padilla petition so that, if it is granted, the case may be argued during the April argument session of the Court this Term.

1. In Padilla, the Second Circuit held that the President of

the United States lacks authority to detain as an enemy combatant Jose Padilla, a United States citizen seized within the United States on May 8, 2002.* The President ordered Padilla's detention as an enemy combatant based on a determination that Padilla is closely associated with al Qaeda and came to the United States to advance plans for the conduct of further terrorist attacks against the United States. See 2003 WL 22965085, at *3, *24.

On December 18, 2003, the Second Circuit ruled that Padilla's detention is barred by 18 U.S.C. 4001(a). The court reasoned that Section 4001(a) prohibits the detention of American citizens detained by the military as enemy combatants, and that "precise and specific language authorizing the detention of American citizens is required to override [Section 4001(a)'s] prohibition." 2003 WL 22965085, at *20. The court determined that Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), fails to authorize Padilla's detention, reasoning that the Authorization does not "include[] the authority to detain American citizens seized on American soil and not actively engaged in combat." 2003 WL 22965085, at *21. The Court likewise found that 10 U.S.C. 956(5), which authorizes the use of appropriated

* As a threshold matter, the Second Circuit rejected the government's arguments that habeas jurisdiction is lacking in the Southern District of New York, where the habeas petition was filed. The court concluded that Secretary Rumsfeld is an appropriate respondent to the habeas petition filed on Padilla's behalf and that the district court's habeas jurisdiction extends to Secretary Rumsfeld. See 2003 WL 22965085, at *6-*10.

funds for the detention of persons "similar to prisoners of war," fails to encompass the detention of "American citizens seized off the battlefield." 2003 WL 22965085, at *23. The court held that, in the absence of statutory authorization, the President's Commander-in-Chief powers under Article II of the Constitution do not encompass the detention of a United States citizen in the circumstances of Padilla's case. Id. at *17-*18.

At the same time, the Second Circuit specifically stated that it was "not address[ing] the detention of an American citizen seized within a zone of combat in Afghanistan, such as the court confronted in Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003)." Padilla, 2003 WL 22965085, at *1. In addition, the Second Circuit repeatedly emphasized that its decision in Padilla did not address the circumstances of Hamdi's detention and was not intended to reflect disagreement with the Fourth Circuit's decision in Hamdi. See, e.g., 2003 WL 22965085, at *11 ("our review is limited to the case of an American citizen arrested in the United States, not on a foreign battlefield"); id. at *13 ("we do not concern ourselves with the Executive's inherent wartime power, generally, to detain enemy combatants on the battlefield"); id. at *31 n.24 ("We only hold that the President's Commander-in-Chief powers do not encompass the detention of a United States citizen as an enemy combatant taken into custody on United States soil outside a zone of combat."). In short, the Second Circuit deemed the Fourth

Circuit's decision in Hamdi to be "inapposite." Id. at *17.

The Second Circuit remanded the Padilla case to the district court with "instructions to issue a writ of habeas corpus directing the Secretary of Defense to release Padilla from military control within 30 days." 2003 WL 22965085, at *23. The court has not yet issued its mandate, however, so the 30-day-period established by the Second Circuit's decision has not yet begun to run. See Fed. R. App. P. 41.

2. The Second Circuit's decision in Padilla is fundamentally at odds with this Court's precedents, e.g., Ex parte Quirin, 317 U.S. 1 (1942), undermines the President's constitutional authority to protect the Nation from additional enemy attacks in wartime, and has resulted in an unprecedented order directing the President to release an individual whom the President, as Commander in Chief, has determined is an enemy combatant intent on committing hostile and war-like acts against the United States. See 2003 WL 22965085, at *24 (Presidential Order). Moreover, the Second Circuit's decision rests on a novel and erroneous interpretation of 18 U.S.C. 4001(a), and Congress's Authorization for Use of Military Force in the current conflict.

Because the Second Circuit's decision in Padilla incorrectly resolves issues of extraordinary public significance, the United States intends to file a petition for a writ of certiorari in the Padilla case on or by January 20, 2004. In addition, in

conjunction with the filing of the petition, the government intends to propose a schedule for expedited consideration of the case in this Court and to move the court of appeals (and, if necessary, this Court) to stay the issuance of the court of appeals' mandate. The government intends to contact petitioners' counsel in Padilla and seek to reach an agreement on a schedule for expedited consideration of the Padilla decision in this Court that would permit the case to be argued in April and decided this Term.

3. Because the Second Circuit went out of its way in its decision in Padilla to distinguish the Fourth Circuit's decision in Hamdi, the Padilla decision itself does not provide a basis for granting certiorari in Hamdi. However, in light of the government's intention to file an expedited petition for certiorari in Padilla, the Court may wish to defer consideration of the petition in Hamdi and to consider the two cases at the same Conference. In formulating its petition for certiorari in Padilla, the government will address the interrelationship between the questions presented by the government's petition in Padilla and the Fourth Circuit's decision in Hamdi.

4. In a supplemental brief filed on January 5, 2004, petitioners in Hamdi state that the Second Circuit's decision in Padilla "clearly conflicts" with the Fourth Circuit's decision in Hamdi on the applicability of 18 U.S.C. 4001(a) "to persons designated enemy combatants by the Executive." Supp. Br. 3. That

argument ignores the repeated statements by the Second Circuit concerning the nature of its ruling. Although the government believes that the Second Circuit's application of Section 4001(a) to Padilla's detention is erroneous and intends to seek review of that ruling in this Court, there is no irreconcilable conflict between the Second Circuit's decision in Padilla and the Fourth Circuit's decision in Hamdi because, as noted, the Second Circuit explicitly did not question the President's authority under Section 4001(a) -- or the Constitution -- to detain an individual, such as Hamdi, captured by the military in an active combat zone overseas.

Petitioners in Hamdi also contend that the Second Circuit's decision in Padilla is in "direct conflict" with Hamdi concerning whether Hamdi was entitled under the Suspension Clause (U.S. Const. Art. I, § 9, Cl. 2) to access to counsel to challenge the Executive's determination to detain him as an enemy combatant, and assert that "all three panel members" in Padilla would agree that Padilla's military detention without access to counsel "violates the Suspension Clause." Supp. Br. 14. That, too, is incorrect.

The panel majority in Padilla explicitly declined to consider whether Padilla was entitled to access to counsel to challenge his military detention. As the Second Circuit explained at the outset of its opinion, the court's conclusion that the President lacked the authority to detain Padilla as an enemy combatant "effectively moots arguments raised by both parties concerning access to

counsel, standard of review, and burden of proof." 2003 WL 22965085, at *33 n.1. It is true that Judge Wesley discussed those issues in his separate opinion concurring in part and dissenting in part, but his statements -- which were not joined by any other panel member -- do not represent the views of the Second Circuit and thus could create no conflict between the Second Circuit and the Fourth Circuit. That is particularly true because, in concluding that Hamdi was not entitled to access to counsel, the Fourth Circuit emphasized the fact that it was undisputed by petitioners themselves in Hamdi that Hamdi was captured in Afghanistan, an active combat zone overseas.

In any event, if the Court concludes, after reviewing the government's petition in Padilla, that certiorari is nonetheless warranted in Hamdi, the schedule for expedited review in Padilla would likewise permit sufficient time for briefing and argument of the Hamdi case during the April argument session of the Court.

Respectfully submitted.

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